

MAR 10 1959

Mr. John A. McCone,
Chairman,
Atomic Energy Commission
Washington 25, D. C.

Dear Mr. McCone:

You have requested guidance from the Department of Justice in the administration of a problem which relates to the application of the conflict-of-interest laws to advisory committees established by section 163 of the Atomic Energy Act of 1954. Section 163 provides:

"SEC. 163. ADVISORY COMMITTEES.--The members of the General Advisory Committee established pursuant to section 26 and the members of advisory boards established pursuant to section 161 a. may serve as such without regard to the provisions of sections 281, 283, or 284 of Title 18 of the United States Code, except insofar as such sections may prohibit any such member from receiving compensation in respect of any particular matter which directly involves the Commission or in which the Commission is directly interested."

Your letter outlines the background of the problem as follows:

"Before setting out an example of the specific kinds of factual situations which have given us pause, I would like to emphasize that for many years the atomic energy business was in the nature of a Government monopoly. Practically every scientist in the effort worked directly for the Government or one of its prime cost contractors.

"Beginning with the passage of the Atomic Energy Act of 1954, the atomic energy community began to take on the color of private enterprise. In the ensuing four years a good many companies, large and small, have and will increasingly be engaged in designing and building nuclear reactors, equipment and facilities. The number of really expert men in this business is, as you might expect, quite small. The same men which the Commission seeks as members of its General Advisory Committee and other section 161 a. advisory boards, are frequently sought as consultants by the principal private companies engaged in the nuclear field. This results in situations which have troubled my colleagues and me.

DOJ Review Completed.

OGC Has Reviewed

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"Assume, for example, that a member of the General Advisory Committee is paid on a WAE basis for between one and two weeks work per year by the Commission. His regular position is Professor of Engineering at a leading university. This member also consults, and is compensated for each consultation, on technical matters for several private concerns.

"While a member of the General Advisory Committee, but not on a day during which he was actively meeting with other Committee members, this member performs consulting services for a private company in connection with its proposal to build a reactor under an AEC contract. He then knows that if the proposal has merit, AEC and the company will negotiate a contract under which AEC would provide as much as several millions of dollars for research relating to the reactor.

"As a member of the General Advisory Committee, the member attends a meeting of the Committee at which one of the items of business is preparing a report to the AEC on the private company's reactor proposal, then before the AEC. He also attends a meeting of the members of both the AEC and the General Advisory Committee, and on the agenda for that meeting is consideration of the reactor proposal.

"We have assumed that the member has not made any attempt to influence the Commission as to the acceptability of the proposal. We realize that such an attempt might possibly constitute a violation of section 18 U.S.C. 434, although it is not altogether clear to us what the phrase 'transaction of business with such business entity' means. It seems fairly clear that this section was intended to apply to an individual who was simultaneously acting as an agent for a private company and the United States Government. Very few cases are ever that clear."

With the foregoing as a background, you pose the following question:

"One specific question upon which we would like guidance is whether or not the member of the General Advisory Committee in the example I have just recited would satisfy the requirements of the conflict of interest statutes by disqualifying himself from the General Advisory Committee and joint General Advisory Committee-Commission consideration of the reactor proposal on which he had consulted with the private company."

There are two criminal statutes which are of particular importance in the situation which you describe. One of these is 18 U.S.C. 434, which

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you mentioned in your letter. This statute prohibits a Government official from transacting business on behalf of the Government with a company in which he is pecuniarily interested. Section 163 of the Atomic Energy Act contains no exemption from this statute. Regardless of the technical application of section 434 to the facts which you describe, I certainly believe that it is desirable for an advisory committee member to disqualify himself from consideration on behalf of the Government of the reactor proposal on which he had consulted with the private company. If 434 is applicable to the situation described, then I have no doubt that disqualification would be effective to avoid violation of the statute.

However, a more serious problem is created by section 281 of title 18, U. S. Code. Section 163 of the Atomic Energy Act exempts advisory committee members from the application of section 281.

"except insofar as such section may prohibit any such member from receiving compensation in respect of any particular matter which directly involves the Commission or in which the Commission is directly interested."

Section 281 provides in pertinent part as follows:

"Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or indirectly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than \$10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States."

Thus, as limited by the exemption, 281 apparently would prohibit an advisory committee member from receiving or agreeing to receive compensation for any services rendered or to be rendered, either by himself or another, in relation to any particular matter which directly involves the Commission or in which the Commission is directly interested.

Disqualification of the committee member from consideration on behalf of the AEC of a matter in relation to which he has received compensation from a private company may not be effective to render section 281, as limited by section 163 of the Atomic Energy Act, inapplicable to the member. It is the receipt of compensation which is condemned by section 281. Disqualification is relevant, nevertheless, to the question of whether the

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services are within the purpose and spirit of section 281. Disqualification would limit the opportunity for the member to use the influence or prestige of his office as an advisory committee member with respect to a matter in connection with which he received compensation from a private company. This is an important consideration because 281 was designed for the purpose of discouraging a Government officer from using his position to further a non-governmental interest.

The purpose of the law and the evil with which it attempts to deal are well known. In a memorandum for the Attorney General dated December 10, 1956, the Acting Assistant Attorney General, Office of Legal Counsel, said (p. 13):

"The legislative history of section 281 clearly evidences the intention of Congress to prevent the exercise or abuse of official influence on the part of Government officials with respect to matters before Government departments, agencies or officers in which the United States is interested. The statute attempts to deal with this situation by prohibiting the receipt of compensation for services in connection with such matters. It does not prohibit the rendering of services without compensation."

The memorandum said also (p. 25) that, although the principal evil with which the statute was concerned was the use of official position to influence matters before agencies, "the statute also aimed to insure efficiency and integrity in government employees." Consequently, it was concluded (pp. 25-26), "any utilization of official position to serve a private client, whether to influence the action of others or not, seems within the ban of the statute."

Courts have rendered interpretations of section 281 consistent with the foregoing analysis. Its purpose was set forth by the Supreme Court in Burton v. U. S., 202 U.S. 344 (1906), involving the prosecution of a Senator for representing private clients in a fraud-order inquiry before the Post Office Department. The Court said (p. 368):

"Evidently the statute has for its main object to secure the integrity of executive action against undue influence upon the part of members of that branch of the Government whose favor may have much to do with the appointment to, or retention in, public position of those whose official action it is sought to control or direct. The evils attending such a situation are apparent and are increased when those seeking to influence executive officers are spurred to action by hopes of pecuniary reward."1/

1/ The statute applies, of course, to compensated services rendered by members of the Executive Branch, as well as those undertaken by members of Congress.

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The Court also considered that the statute was enacted "to promote the efficiency of the public service and enforce integrity in the conduct of * * * public affairs." (p. 367).

In United States v. Adams, 115 F. Supp. 731 (D. N.D. 1953) the court said (pp. 734-5):

"The purpose of the statute is plain. It was aimed at preventing Congressmen, officers and employees of the United States Government from using the weight of their positions or their influence in connection with matters which were to be determined before any department, agency, court martial, officer or commission and was to assist in insuring the integrity of such departmental determination."

In United States v. Reisley, 35 F. Supp. 102 (D. N.J. 1940) the court said (p. 104):

"Congress has enacted numerous statutes with the purpose of safeguarding the integrity of the public administration and has made penal many actions by public officers which would result in corruption in government * * *. In section [281] * * * Congress dealt with that threat to the integrity of governmental action which arises when a Senator, Representative, departmental head or other Federal officer or clerk sells his influence to a claimant against the government. It is the trading for pay of the prestige or power which comes with the defendant's position in the government that is dealt with by this section."

What are "services" within the meaning of the section has been the subject of specific judicial inquiry. It seems clear that the services rendered need not be improper or illegal in order to constitute prohibited services within the meaning of 281. As pointed out in May v. U. S., 175 F. 2d 994 (C.A. D.C. 1949), "the gist of the offense is the receipt of compensation, not the nature of the act done by the recipient in consequence thereof." The Court said (at p. 1006):

"If the money was received by May as compensation for acts done by him for the Garssons, it is immaterial that those acts were patriotic, legitimate and within the scope of his official duties as a Congressman.

"Thus, even if the service rendered is proper, the receipt of compensation therefor renders it illegal."

The above view seems fully in accord with the legislative history of the statute as well as its express language. The prohibition is against the rendering of services for compensation, and, although the object of

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the statute is to prevent the use or abuse of official position to influence agency action, there would seem to be no requirement that the officer actually try to influence such action. On the other hand, a Federal court has held that inquiries by a Congressman concerning the status of a matter pending before a Federal bureau, without discussion of the merits of the case, did not constitute the rendition of "services." U. S. v. Quinn, 141 F. Supp. 622 (D. N.Y. 1956). In outlining the elements essential to sustain a conviction the court listed as one essential element

"That compensation was received in return for services rendered for purpose of interceding with, or with intent to influence and persuade, officers and employees of federal bureau to obtain favorable decisions and actions in matters pending before the bureau" (p. 627).

I think that the factual situation must be viewed against the background of the purpose of section 281 as set forth above. The possibility that the statute would be applied to penalize conduct constituting merely a literal violation seems remote. On the other hand, courts have not hesitated to apply the statute to factual situations which do not involve any actual wrongdoing but which present an obvious opportunity for the wrongdoing which the statute was enacted to prevent -- the use of public office to advance a private interest. If the services for the company should involve representation before the AEC, whether by telephone, letter or personal appearance, there would exist an opportunity for the advisory committee member to exercise official influence. Such services clearly would be proscribed by section 281. Similarly, if the member in the course of his consultant services to the company should make use of confidential Government information, this would be an improper use of his Government office and probably an offense against section 281 and possibly other statutes.

The criterion, it seems to me, is whether the consultant services in question afford an opportunity to the advisory committee member to make use of his Government office to advance the interests of his company. Of course, if in fact he makes use of the Government office to further these interests there is no doubt that he has misused his public office and this, unquestionably, would be a violation of section 281. However, I believe that you are primarily concerned only with the existence of opportunity to misuse the public office. If you conclude that the services rendered to the private company are so closely related to the Government position of the committee member that an obvious opportunity would exist for the consultant to use his public office to assist his private client, then I think that the committee member should be required to terminate the private consultant services in question. 2/

2/ This conclusion might also indicate a possible violation of 18 U.S.C. 1914. See Opinion of the Attorney General of May 31, 1955, to the Secretary of Agriculture, concerning private compensation paid to member of Turkey Industry Advisory Committee.

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In determining what restrictions should be placed upon advisory committee members with respect to the situation outlined and other similar situations, I think that you should be concerned primarily with whether 1) there is an actual conflict of interest, entirely apart from the terms of any statute, 2) whether the conduct in question comes within the spirit and purpose as well as the letter of 18 U.S.C. 281, and 3) whether there is such an appearance of conflict that the conduct should be prohibited as a matter of public policy. Undoubtedly, the situation described is embraced literally within the terms of section 281. Moreover, insofar as the committee member personally considers on behalf of the Government the same matter upon which he advises a private company there appears to be an actual conflict of interest. Disqualification of the advisory committee member from officially considering matters on which he consults for a private company is necessary to avoid an actual conflict of interest. Whether there is a real violation of section 281 would seem to depend upon whether the employment in question affords the member an opportunity to use the Government office to further the interests of the private client, either by using official influence or by making use of confidential information or otherwise.

Sincerely yours,

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Office of Legal Counsel